Office - Supreme Court, U. S.
FILED
1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 527

MARCEL BANKE and GEORGE A. GLOOR,
Petitioners,
vs.
NOVADEL - AGENE CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

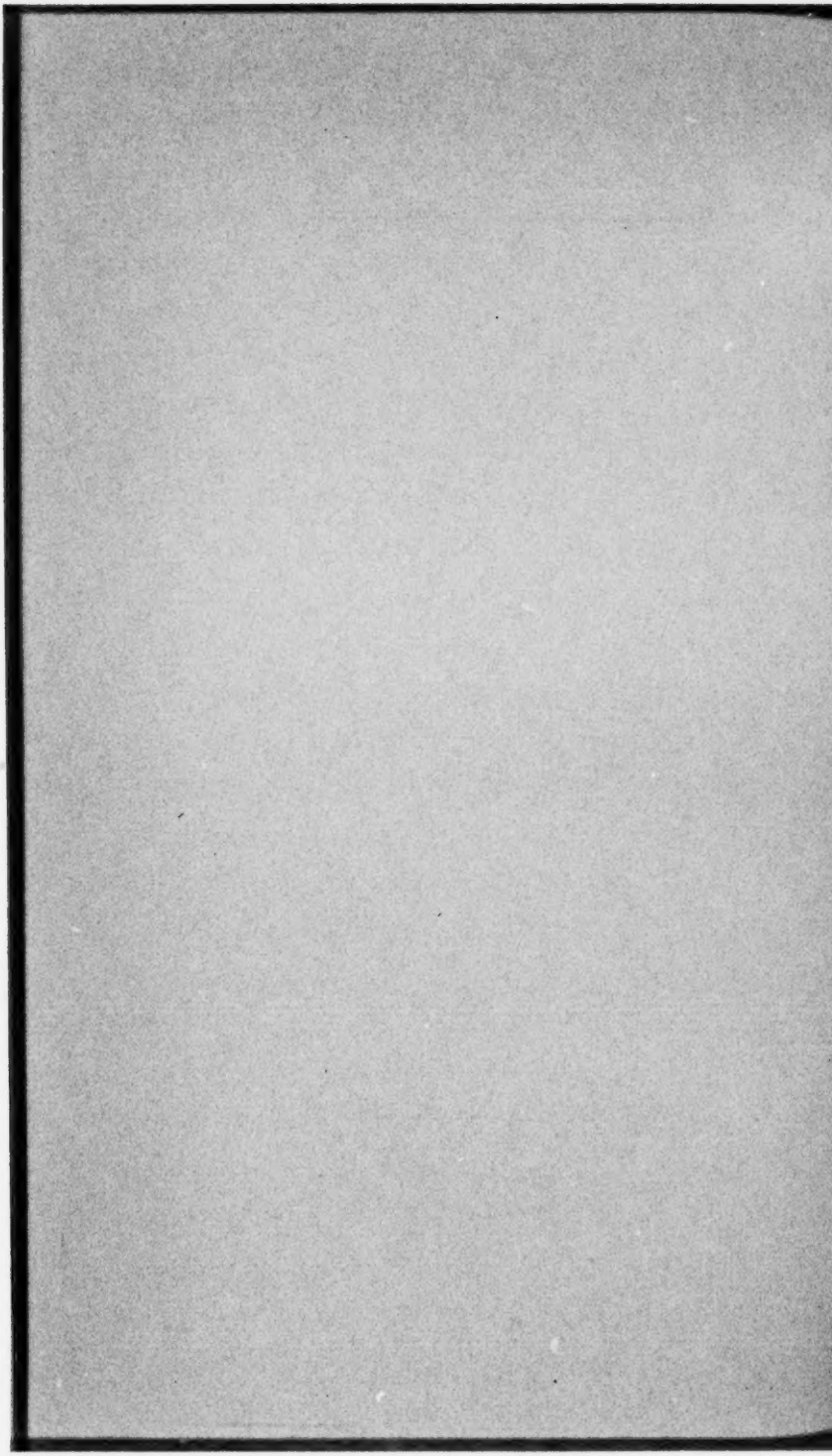
—

BRIEF IN SUPPORT

RALPH B. LACEY,
Attorney for Petitioners,
1204 Dime Building,
Detroit, Michigan.

J. SHURLY KENNARY,
Of Counsel,
1233 Dime Building,
Detroit, Michigan.

Interstate Brief & Record Co., Case Bldg., 607 Fort St. W., Detroit, Mich.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.....

MARCEL BANKE and GEORGE A. GLOOR,
Petitioners,
vs.
NOVADEL - AGENE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the petitioners, Marcel Banke and George A. Gloor, and respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court, on a day certain to be

therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Marcel Banke and George A. Gloor, Defendants and Appellants v. Novadel-Agene Corporation, Plaintiff and Appellee, No. 9003, to the end that the said case may be reviewed and determined by this Court and that the said judgment of the said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JURISDICTIONAL STATEMENT

Section 240 (a) Judicial Code, as amended, confers jurisdiction upon the Supreme Court, to review by writ of certiorari, upon petition of any party thereto, the judgment herein of the Circuit Court of Appeals Sixth Circuit, entered on August 28, 1942, affirming a final decree of a District Court. The petitioners, parties to said case, present their petition for writ of certiorari within three months after the entry of said judgment in compliance with Section 350, Judicial Code.

QUESTIONS PRESENTED

1. Does the entry of an *ex parte* final decree authorizing a permanent injunction, prior to trial of issues and without findings of fact, deprive the enjoined litigant of his constitutional right to due process of law?

2. Does a motion to set aside a void decree entered without jurisdiction, thereby confer jurisdiction *ex post facto* upon the court to sustain the decree?

3. May the Circuit Court of Appeals, in any case where original jurisdiction arises through diversity of citizenship, deny the application of Section 725 U.S.C.A.?

REASONS FOR ALLOWANCE OF WRIT

The said Circuit Court of Appeals has:

1. Sanctioned such a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Honorable Court's power of supervision, in that it affirmed a final decree entered *ex parte* without jurisdiction and without compliance with the rules of Civil Procedure.

2. Decided a federal statutory question in conflict with applicable decisions of this Honorable Court in that it refused to apply the Michigan decisions in accordance with Section 725 U. S. C. A.

SUMMARY STATEMENT OF MATTER INVOLVED

Prior to December 9, 1940 the petitioners and the respondent each received a notice of hearing (R. 57) from the clerk of the District Court that the above entitled cause had been placed on the pre-trial calendar and would be called before the Honorable Ernest A. O'Brien, District Judge, in his Court Room on Monday, December 16, 1940 at 2 P. M.

Without regard to the pre-trial assignment, upon an oral request and without notice to the opposite party another District Judge, Honorable Arthur J Tuttle, on December 9, 1940, signed and filed a final decree authorizing a permanent injunction in the case (R. 50). None of the rules of civil procedure were complied with in this proceeding.

When the petitioners learned of the permanent injunction they filed a motion to vacate (R. 52). A hearing was had, the petitioner Banke appearing without benefit of counsel, and the motion was denied (R. 57). The Circuit Court of Appeals held that the irregularities in the entry of the permanent injunction was cured by the hearing on the motion to vacate (R. 71). The Court gave no consideration to the major objection, viz: that Judge Tuttle had no jurisdiction to take any proceedings in a case then regularly assigned by the clerk of the court to another judge.

These proceedings occurred in a case wherein the respondent had filed a bill of complaint seeking an injunction against the petitioners, based upon a summary judgment in a previous case of dismissal of a bill, filed by petitioners against respondent, for infringement by manufacturing, selling and using devices for cooling beverages.

Petitioners are the inventors of a new and useful article called a converter, used for pumping liquids. The United States and other governments extensively use the converter for pumping water in equipment for fighting forest fires. The converter is a mechanism for housing carbon dioxide gas vaporized within the mechanism from solid carbon dioxide (dry ice) and utilizing the same for useful purposes.

Possessed of the converter, the petitioners combined therewith a closed refrigerant chamber, including chambered walls of heat conducting material, whereby the liquid in the container would be cooled, together with necessary conduits between the container and the converter to accomplish the desired purpose and applied for and received a patent upon a combination for cooling, aerating and dispensing beverages.

The respondent has a patent on coils in the keg on account of the location of the cooling coil in the bottom part of the keg and the permanent fixture thereof therein; it combines therewith a refrigerant unit for the circulation of ice water through the coils to cool the beer in the keg. Exhibit A (R. 4) pictures same. The said Circuit Court of Appeals found that "Exhibit A disclosed the method or system by which the beer is cooled" (R. 71). In the original case, District Judge Lederle found that "the device shown in Exhibit A" does not infringe any of the claims of petitioners' combination patent. No appeal was taken from the summary judgment of dismissal of suit on this finding.

In petitioners' answer (R. 27) to respondent's bill of complaint herein, that petitioners be restrained from instituting any action against respondent, petitioners admit that the mechanism for cooling beer shown in Exhibit A does not in and of itself infringe petitioners' patent, but that when that mechanism is combined with an aerating and dispensing element, an equivalent of petitioners' converter, furnished by others than respondent, the so completed apparatus, is then a combination for cooling, aerating and dispensing beverages; that the device so constructed of combined mechanism is an infringement of petitioners' patent; that the defendants are legally entitled to institute action against the respondent and those confederating with respondent, who furnish the additional mechanism to respondent's apparatus, required to complete a cooling, aerating and dispensing unit.

The bill herein claims a wide construction of the summary judgment in the original case. It avers that that judgment covers not only the "device shown in Exhibit A" (the words used by the Court in the findings of fact therein) but also the use of that device when combined

with aerating and dispensing equipment. The petitioners, in addition to denial of this contention, claim, that the instant action, being an original bill to enforce a decree, apart from their fundamental right to a hearing on the new issues in the instant case, not involved in or concluded by the previous decree, that, under the Michigan rule, applicable herein under the Federal statute, they are entitled to controvert the issues in the original decree.

The decision of the said Circuit Court of Appeals, overrides the Michigan rule, notwithstanding the Federal statute and the decisions of this Honorable Court.

The petitioners possess valuable property rights of which they have been deprived without their day in court.

MARCEL BANKE,
GEORGE A. GLOOR,
Petitioners.

RALPH B. LACEY,
Attorney for Petitioners,
J. SHURLY KENNARY,
Of Counsel.

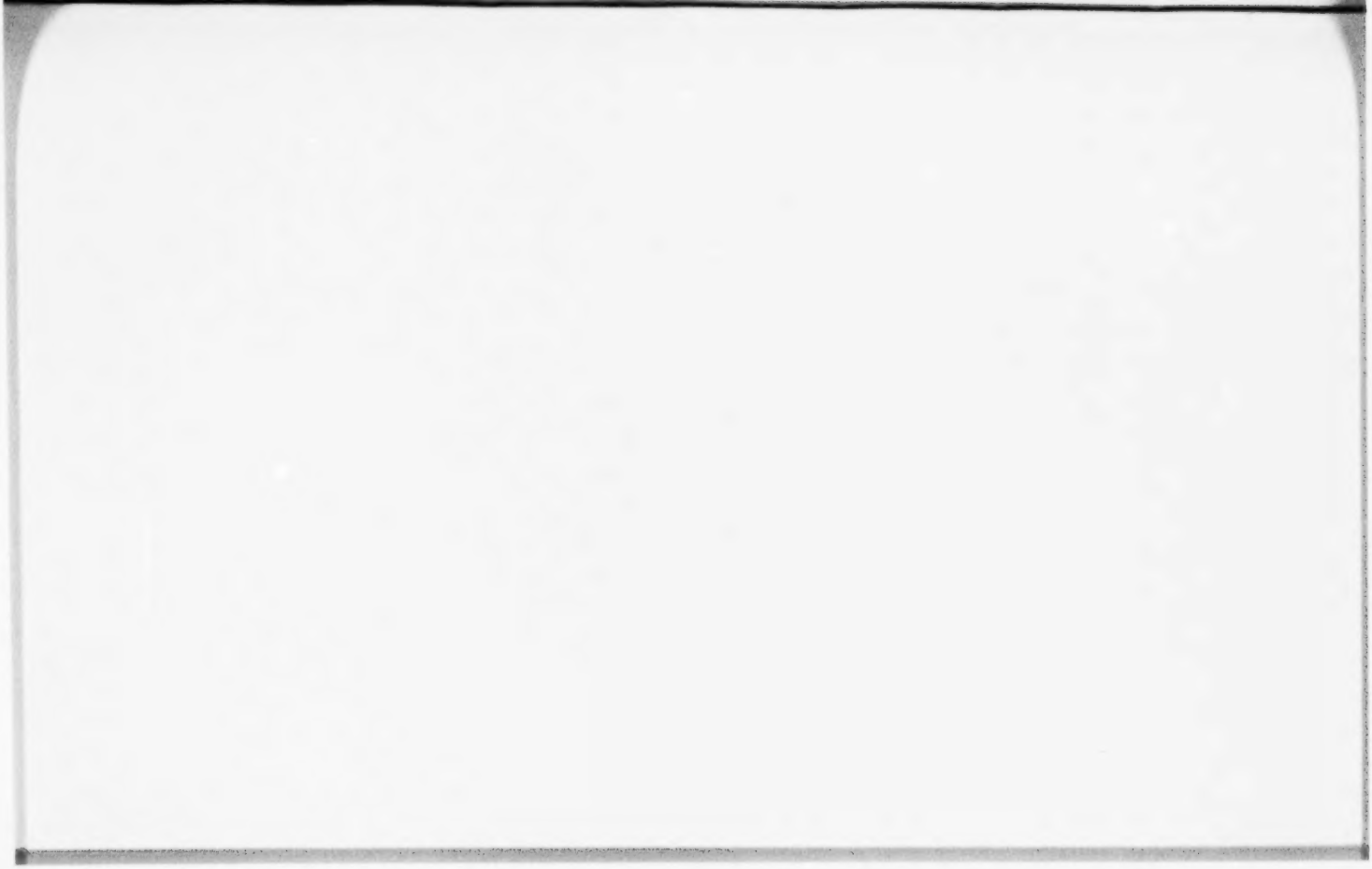
INDEX TO BRIEF

	Page
Summary of Argument	9
Argument	10-19
Original Jurisdiction	10
Method of Entry of Decree	10-11
Effect of Decree	11
Rules of Civil Procedure	11-13
Due Process	13
Validity of Decree	13-16
(1) The rules were violated	14
(2) The Judge was without jurisdiction	14-15
(3) A motion to vacate a void decree does not confer jurisdiction ex post facto	15-16
Michigan Rule	16-18
Application of the Two Rules	18-19

INDEX TO AUTHORITIES CITED

Act of June 19, 1934, Ch. 651	1
Atwell v. Barnes, 109 Mich. 10	16
Cangdon v. Wayne Circuit Judges, 76 Mich. 358	14
Cofrode v. Wayne Circuit Judge, 79 Mich. 332	16
Eliot v. Piersel, 7 Peters 328, 340	15
Erie Railroad Co. v. Tompkins, 304 U. S. 64	10
Federal Statute, Sec. 725 U. S. C. A.	10
Gillen v. Wakefield State Bank, 246 Mich. 158	16
Hass v. U. S., 93 Fed. (2nd) 427	11-12
Jerry v. McClintock, 41 Mich. 492	17
J. F. Hartz Co. v. Lukaszcewski, 200 Mich. 230	16
Larsen v. Northland Trans. Co., 292 U. S. 20	18
MacLean v. Speed, 52 Mich. 257	14-15

	Page
Nichols v. Houghton Circuit Judge, 185 Mich. 654...	16
Pinel v. Pinel, 178 Mich. 596.....	17
Postal Telegraph-Cable Co. v. City of Newport, 247 U. S. 464.....	12, 13
Simon v. Craft, 182 U. S. 427.....	13
Smith v. Fato, 285 Mich. 361.....	19
West v. American Telephone & Telegraph Co., 311 U. S. 223.....	10
Wilcox v. Jackson, 13 Peters 489, 509.....	15
Woodliff v. Citizens Bldg. & Realty Co., 245 Mich. 292	16



IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.....

MARCEL BANKE and GEORGE A. GLOOR,
Petitioners,
vs.
NOVADEL - AGENE CORPORATION,
Respondent

BRIEF IN BEHALF OF PETITIONERS

SUMMARY OF ARGUMENT

It is the Petitioners contention, that

1. When a litigant has been irregularly denied his day in Court, he has been deprived of property without due process of law.

2. A hearing on a motion to vacate a decree—void for lack of jurisdiction—does not confer jurisdiction *ex post facto* to validate the decree.

3. The judgment, in refusing to apply Michigan decisions is in violation of the Federal statute and decisions of this Court.

ARGUMENT

ORIGINAL JURISDICTION

The bill of complaint herein was filed by Respondent a New Jersey Corporation, against Petitioners, residents of the City of Detroit, Michigan, in the United States District Court for the Eastern District of Michigan, Southern Division, upon the jurisdictional ground of diversity of citizenship (R. 1). That makes applicable to this case the Federal statute, section 725 U. S. C. A. which provides:

> "The laws of the several states * * * shall be regarded as rules of decision in trials at common law, in the courts of the United States * * *."

In construction thereof this Court has determined that,

> "The rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute."
>
> *Erie Railroad Co. v. Tompkins,* 304 U. S. 64;
> *West v. American Telephone & Telegraph Co.,* 311 U. S. 223.

These rules grant controlling weight to the Michigan decisions upon the various questions herein involved.

METHOD OF ENTRY OF DECREE

The case being at issue ready for trial the Court Clerk assigned it on the pre-trial docket to Judge Ernest A. O'Brien for hearing on December 16, 1940, at 2 P. M. Counsel for the parties received notice of this hearing prior to December 9, 1940. On December 9, 1940, counsel

for Respondent, without notice to Petitioners, orally requested Judge Tuttle to enter a final decree. The decree was entered then and there without any findings of fact.

The Petitioners learning of the decree, filed a motion before Judge Tuttle to vacate the decree. Being without counsel the Petitioner Banke argued in person. Judge Tuttle denied the motion.

The method of the entry of the decree and the effect given by the said Court of Appeals to the hearing on the motion to vacate are prime factors in the instant application.

EFFECT OF DECREE

The Petitioners are the owners of a combination patent for cooling, aerating and dispensing beverages; the Respondent holds no such patent; the decree privileges the Respondent to manufacture and sell the apparatus covered by Petitioners' patent with immunity.

RULES OF CIVIL PROCEDURE

When Congress enacted the Act of June 19, 1934, Ch. 651 authorizing this Court to prescribe by general rules civil procedure in the district courts, it included therein a prohibition that:

> "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."

What is prohibited to this Court by the foregoing Congressional Enactment is prohibited to the district courts and each and every judge thereof. One of the substantive rights of a litigant is to present his proof.

> "Congress and the Legislatures of the states may modify and control rules of evidence and may apply

> new rules to pending causes of action, provided a party is not deprived of his right to present his proof."
>
> *Hass v. U. S.*, 93 Fed. (2nd) 427.

The rules adopted by this Court clearly maintain the substantive right of the litigant to present his proof upon a trial of the issues, unless, in so far as this case is concerned,

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." (Rule 12(c).)

The rules, (7,b) require motions to be in writing, with notice (6,d) thereof served upon the opposite party; Rule 52 requires that "the court shall find the facts specially and state separately its conclusions of law thereon." None of these rules were complied with, yet a Court, without authority, enters a final decree upon the pleadings.

A serious question of fact is involved in the pleadings. Did the Judge follow the rule announced by this Court?

> "Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true."
>
> *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. 464.

Without findings of fact and conclusions of law this question cannot be answered, but it suggests another. The pleadings do not contain a copy of Petitioners' patent, how then was the Judge in a position, on the pleadings, to find that a combination of Respondent's mechanism, shown in Exhibit A, plus an aerating and dispensing equipment

did not infringe Petitioners' patent? Where is the basis that authorizes a permanent injunction restraining Petitioners from instituting any action in any court for infrigement on account of that form of combination?

DUE PROCESS

Did the entry of the *ex parte* final decree without a hearing on the merits, without a motion for judgment on the pleadings, without notice to Petitioners, without compliance with any of the rules of civil procedure deprive the Petitioners of property without due process of law contrary to the 14th amendment of the U. S. Constitution? The answer is found in decisions of this Court.

> "The essential elements of due process of law are notice and opportunity to defend."
>
> *Simon v. Craft,* 182 U. S. 427.

> "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."
>
> *Postal Telegraph Co. v. Newport, supra.*

VALIDITY OF DECREE

There is no dispute today between the writer and Judge Tuttle that the decree when entered was void; we contend further that no matter what happened since the entry, the decree is still void. Our reasons are threefold (1) All the rules were violated, (2) the Judge was without jurisdiction, (3) a motion to vacate a void decree does not confer jurisdiction *ex post facto.*

(1) The rules were violated.

We have stated the violations which deprived the Petitioners of substantive rights; we have observed that "notice and opportunity to defend" are "essential elements of due process"; we now desire to suggest that in the absence of an application in accordance with Rule 12(c) the court is without authority to enter a judgment on the pleadings.

The rule creates the authority to grant a judgment upon the pleadings. When the rule is not invoked in the manner therein prescribed, there is nothing before the court to act upon; with nothing before the court, most assuredly, the court is without authority to enter a judgment upon the pleadings.

When it is the substantive right of the litigant to present his proof, he should not be deprived thereof by any order or decree entered without authority. It is more important to all the people of the United States that the rules be observed, than that some way be found to validate an order entered in flagrant violation of all the rules.

(2) The Judge was without jurisdiction.

It will be recalled that when Judge Tuttle elected to enter a final decree herein the case was not on his docket, but was upon the docket of an associate District Judge, Ernest A. O'Brien.

> " 'Jurisdiction,' when applied to courts, is the power to hear and determine a cause or matter."
>
> *Cangdon v. Wayne Circuit Judges,* 76 Mich. 358.

> "When a court of competent jurisdiction has become possessed of a case, its authority continues subject only to the appellate authority, until the

matter is finally and completely disposed of; and meanwhile no court of co-ordinate authority is at liberty to interfere with its action."

MacLean v. Speed, 52 Mich. 257.

Judge O'Brien was "possessed of this case." It had been regularly assigned to him by the Court Clerk. Judge Tuttle did "interfere" by the entry of the *ex parte* final decree. At the time of the entry of the decree "the power to hear and determine" the case rested exclusively in Judge O'Brien. How extensive was Judge O'Brien's authority in the case? This Court has answered,

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause."

Wilcox v. Jackson, 13 Peters, 489, 509.

Judge Tuttle could not deprive Judge O'Brien of that authority or confer jurisdiction upon himself by his own act. The *ex parte* final decree entered by Judge Tuttle was void when entered, always has been, and still is void for lack of jurisdiction.

(3) A motion to vacate a void decree does not confer jurisdiction ex post facto.

"Where courts act without authority, their orders are nullities. They are not voidable, but void."

Eliot v. Piersel, 1 Peters 328, 340;
Wilcox v. Jackson, supra.

The said Circuit Court of Appeals held (R. 71) that the "vital irregularities" were "cured" by the hearing on the motion to vacate. No authorities were cited in support of this doctrine. It runs counter to the Michigan decisions.

"If want of jurisdiction affirmatively appears by the files, it would not be cured by testimony on a hearing."

Woodliff v. Citizens Bldg. & Realty Co., 245 Mich. 292.

"Jurisdiction of the subject-matter cannot be conferred on a court by consent."

J. F. Hartz Co. v. Lukaszcewski, 200 Mich. 230;
Nichols v. Houghton Circuit Judge, 185 Mich. 654;
Cofrode v. Wayne Circuit Judge, 79 Mich. 332.

"Where the defects are jurisdictional, no waiver can cut off the rights of the party or interfere with his right to complain."

Atwell v. Barnes, 109 Mich. 10.

"An objection to the suit for want of jurisdiction of the subject-matter is good at any time."

Gillen v. Wakefield State Bank, 246 Mich. 158.

In its decision of this one question the said Circuit Court of Appeals has so far sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

MICHIGAN RULE

Under the Federal Statute and the decisions of this Court in the *Erie* and *West* cases, *supra,* the Federal Courts are obligated to apply to this case the Michigan Judicial decisions as "rules of decision" herein. We have pointed out digressions by said Circuit Court of Appeals on ques-

tions *supra*; we here request this Court's attention to a specific Michigan rule relating to the rights of a defendant in an independent action to enforce a decree rendered in a previous action between the same parties.

We argued the rule at the hearing and in the brief in application for rehearing we stated:

> "Whether the Michigan rule is a good rule or a bad one; whether this Court likes it or doesn't like it; under the law, until the Michigan Supreme Court nullifies it, this Court must apply the rule in all applicable cases" (R. 86).

What is the rule? Where recourse by original bill is had to the Court to obtain the benefit of its former judgment, the defendant in the second case has

> "the right to introduce testimony bearing upon the issues in the original hearing."
>
> *Pinel v. Pinel,* 178 Mich. 596.

In *Jerry v. McClintock,* 41 Mich. 492, wherein the rule was originally announced, defendant's counsel urged that the filing of the second bill, in virtue of its own force, opened the whole original cause, notwithstanding the decree. The opinion, sustaining that contention, concludes the consideration of the question of defensive rights with these words,

> "In fine it seems to have become settled that the court acting on the maxim that he who asks equity ought to do it, will meet the call made by the complaint on its justice to execute its previous decree by an application of its equitable discretion to the circumstances to see whether the decree is one which it would be just to enforce; and if not, then to change it to meet the requirements of equity or refuse assistance altogether."

With the issues in the second case that were not in the first case, it may not be at all necessary to introduce "testimony bearing upon the issues in the original hearing." However, under the Michigan rule the right to do so belongs to the petitioners, if to obtain justice, the occasion so requires. The Circuit Court of Appeals opinion, *contra* to the Michigan rule, not only deprives them of that right, but also denies a trial upon the new issues, for the stated reason that "appellants were bound by that decree as between the parties before the court," as "the decision of Judge Lederle was final."

Where new issues are involved between the parties, this Court has consistently announced a different rule:

> "The established rule in this court is that if, in a second suit between the parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the former cause is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' "
>
> *Larsen v. Northland Trans. Co.*, 292 U. S. 20.

APPLICATION OF THE TWO RULES

If the Petitioners were plaintiffs in a second case against the Respondent the rule of this court would apply; not being plaintiffs, but defendants in a second case, for an enforcement of the decree in the first case, the Michigan rule is applicable and must be applied under the Federal Statutes and decisions of this Court in construction thereof.

The rule of this Court confirmed in the *Larsen* case does permit a second trial between the same parties upon "a claim or demand different from the one sued upon in the prior action." Michigan has the same rule,

> "To be *res adjudicata* the questions must have been actually litigated and determined in the former suit."
>
> *Smith v. Fato,* 285 Mich. 361.

No rule, either of this Court or of the Michigan Supreme Court estops the Petitioners from instituting an action against Respondent upon a claim different from the prior action; and yet, an injunction issued, restraining Petitioners, beyond the scope of Judge Lederle's decree, upon matters that were not "litigated and determined" in the former suit.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

RALPH B. LACEY,
Attorney for Petitioners.

J. SHURLY KENNARY,
Of Counsel.

DEC 14 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 527

MARCEL BANKE and GEORGE A. GLOOR,
Petitioners,

vs.

NOVADEL-AGENE CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLAIR W. FAIRBANK,
MORRIS HIRSCH,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

MARCEL BANKE and GEORGE A. GLOOR,

Petitioners,

vs.

NOVADEL-AGENE CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The "Questions Presented" in the petition propound propositions that do not arise in the case at bar.

The sole proposition on which the petition is in fact predicated may be formulated as follows:

> In the face of a final judgment holding non-infringement, has the plaintiff in a patent infringement suit the right to threaten the customers of the successful defendant with proceedings for patent infringement and contempt of Court?

That no plaintiff in a patent suit has such right has been settled long ago by this Court. *Kessler* v. *Eldred*, 206 U. S. 285.

The effective judgment as between the parties was that of April 19th, 1939 by Judge Lederle in the United States District Court for the Eastern District of Michigan, from

which these petitioners had taken no appeal. That judgment finally and conclusively determined that the respondent here does not infringe upon the patents of petitioners.

The case at bar is an ancillary suit brought by respondent to restrain petitioners from sending notices of infringement or actually bringing suit against respondent or its customers, predicated upon the use of the very equipment and methods that had been finally adjudged to be non-infringing in the underlying patent suit that involved the same parties.

While the petitioners do not challenge the right of respondent to *make* and *sell* the equipment originally charged as an infringement, they insist that the *customers* of respondent do not enjoy the right to *use* such equipment in the only way in which it is capable of being used.

Judge Lederle's findings in the underlying judgment afford no basis for such contention, for the patent suit was dismissed not only as to respondent, but also as to the co-defendant Barney Litheral, doing business as Barney's Café, a customer *using* the respondent's equipment (R., p. 62).

The district court decided adversely to petitioner's tortured construction of the underlying judgment, as did on appeal the Sixth Circuit Court of Appeals. Petitioners stand perpetually enjoined:

> "* * * from threatening anyone in writing or by word of mouth or otherwise with suit for infringement, direct or contributory or with contempt proceedings, civil or criminal, by reason of the manufacture, use or sale of the equipment of plaintiff, Novadel-Agene Corporation, as identified by Exhibit A attached to the Bill of Complaint, when used in the manner indicated in said Exhibit; that is, when the brew is propelled from the keg either by carbon

dioxide gas or air connection as indicated on the rear page of Sheet 2 of said Exhibit, and further enjoining the said defendants from the actual bringing of any suit in any Court in the premises" (R., p. 51).

Nothing in the foregoing order prevents petitioners from threatening or bringing patent litigation against any concern not in privity with respondent, or for that matter, against suing respondent itself, or its customers, for the manufacture, sale or use of equipment or installations differing from that shown in Exhibit A.

Petitioners complain that there was irregularity in the *procedure* that led the courts below to the only order they could possibly issue that would give effect to the underlying final judgment of April 19th, 1939. Petitioners now request this Court to order the idle ceremony of "regular" procedure which must inevitably lead to a re-affirmance of the permanent injunction now in force.

As a matter of fact, the proceedings attacked in this petition were strictly in accord with the Federal Rules of Civil Procedure.

The hearing in the District Court on December 9th, 1940 was upon motion of *petitioners*, not of respondent (R., p. 46). *Petitioners* noticed for hearing on December 9th, 1940, their motion for modification of a preliminary injunction previously issued out of the district court (R., p. 45). At the hearing Judge Tuttle not only denied the motion to modify, but made the preliminary injunction permanent. This he did on motion of respondent, made during the hearing, pursuant to Rule 7-b (1) of the Rules of Civil Procedure which provides:

"An application to the Court for an order shall be by motion which, *unless made during a hearing or*

> *trial,* shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis ours.)

Petitioners did not personally attend the hearing on December 9th, 1940. Petitioner Banke sets forth in his affidavit (R., pp. 65, 6) that this was due to a misunderstanding, believing as he did, that that hearing was superseded by the notice received by him from the district court, which listed the case on the pre-trial calendar to be called December 16th, 1940.

In view of that misunderstanding of petitioners, Judge Tuttle readily granted a rehearing on December 17th, 1940, at which all interested parties were present, and after further hearing on the merits, the court adhered to its order of December 9th, 1940, granting the permanent injunction (R., p. 57).

The order for permanent injunction dated December 9, 1940 was thus issued in strict accordance with the rules. But assuming that it was not, petitioners have no cause for complaint, for they availed themselves of the opportunity that the Court afforded them December 17th, 1940 for a full hearing on the merits.

Conclusion.

The petition fails to show that the Circuit Court of Appeals

> "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision." [Rule 38 (5b)].

The Circuit Court of Appeals, as we have shown, followed the accepted course of judicial proceedings and

sanctioned no departure from such course on the part of the district court and quite properly affirmed the judgment below.

There is no occasion for any exercise of this Court's power of supervision.

It is therefore submitted that the petition should be denied.

Respectfully submitted,

CLAIR W. FAIRBANK,
MORRIS HIRSCH,
Counsel for Respondent.